No. 78-835

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES A. SAETTELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 585 F.2d 307.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1978. A petition for rehearing (Pet. App. B) was denied on October 2, 1978. On October 11, 1978, Mr. Justice Blackmun extended

the time for filing a petition for a writ of certiorari to December 1, 1978. The petition was filed on November 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's refusal to order the government to grant immunity to two defense witnesses denied petitioner a fair trial.

STATEMENT

Following a jury-waived trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of receiving and selling stolen property moving in interstate commerce, in violation of 18 U.S.C. 2315, and of conspiring to commit that offense, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed, one judge dissenting (Pet. App. A-1 to A-14).

The evidence at trial showed that in February 1976 Joseph McGirr, Thomas Sargis, and Russell Briddle broke into the apartment of a jewelry dealer in Miami Beach, Florida, and stole approximately 300 pieces of jewelry, including a five-piece set of Russian jewelry valued at $500,000 (Tr. 13-19, 106-107).[1] In an

[1] Joseph McGirr, who testified under a grant of immunity, was the government's chief witness at trial. The government called three FBI agents and the dealer from whom the jewelry was stolen to corroborate McGirr's testimony.

attempt to sell the jewelry, the three men went to St. Louis, where they were introduced to petitioner, a jeweler, by Marshall Chappel, a part-time jeweler and an acquaintance of petitioner's (Tr. 27).

Petitioner expressed an interest in buying the jewelry but stated that he did not have enough money to buy it at that time (Tr. 28). At a second meeting, petitioner told the thieves that he had a friend who might lend him the money to buy the jewelry. He asked to take some of the jewelry to Miami to show his friend, but McGirr replied that that might be a problem because Miami was the city where the jewelry had been stolen. At that meeting, McGirr and Sargis gave petitioner several bracelets, worth approximately $40,000, in exchange for $4,000 in cash, two automobile titles, and a diamond ring (Tr. 29-30).

After petitioner returned from Miami without having obtained the loan, it was agreed that he would sell the jewelry on consignment. McGirr and Sargis returned the car titles and the diamond ring, and, as a down payment, petitioner gave them $6,000 in addition to the $4,000 he had previously paid them. In return, petitioner received most of the jewelry and agreed to pay the thieves an additional $40,000 as he sold it. Once the $40,000 was paid, petitioner was to be given access to the remaining jewelry—the Russian set and two blue diamonds (Tr. 31-33). Before McGirr was arrested in April 1976 for a parole violation, he had received about $1,000 from petitioner for the sale of some of the jewelry (Tr. 37-38).

On April 22, 1976, FBI agents interviewed petitioner and questioned him about the stolen jewelry (Tr. 85-86). Petitioner denied knowing McGirr or Sargis and said he had never been to Sargis's residence. McGirr had previously told the FBI that several meetings between petitioner, Sargis, and himself had taken place at Sargis's residence, and FBI agents had seen petitioner there while they were surveilling the house (Tr. 87-88, 76-77, 82). In May 1976 petitioner was called to testify before the grand jury, but he refused to testify and rejected an offer of immunity (Tr. 170). The next month, FBI agents arrested Sargis and seized the unsold jewelry from him (Tr. 91-92, 167).

Petitioner testified in his own behalf. He admitted being involved in the fencing operation, but he claimed that his involvement had been coerced. He testified that Chappel had told him the jewelry belonged to a retired dealer who wanted to sell his collection. He admitted, however, that he had never asked who the retired jeweler was, nor had he ever asked to see a bill of sale or consignment memorandum, despite the unusual size and value of the collection (Tr. 176-177; 181-183). Petitioner claimed that when he later became suspicious that the jewelry was stolen, he tried to back out of the deal, but that McGirr and Sargis threatened to kill him and his family if he did not cooperate or if he tried to go to the police (Tr. 156-160). He explained that his refusal to testify before the grand jury was also based on his fear of harm to himself and his family (Tr. 170).

Petitioner's wife corroborated his story (Tr. 213), and it was stipulated that two other witnesses would testify that petitioner's wife had told them that petitioner was in trouble with respect to some stolen jewelry and that threats had been made on his life and the lives of members of his family (Tr. 219-220).

The defense also called Marshall Chappel and Thomas Sargis to testify in support of petitioner's claim of duress, but both asserted the privilege against compulsory self-incrimination and refused to testify (Tr. 119-122, 125-129).[2] Petitioner then moved to have the court grant immunity to both Chappel and Sargis to compel their testimony as defense witnesses. In support of that motion, petitioner offered stipulations as to statements given to defense counsel by Chappel and Sargis to the effect they had threatened petitioner during the time of the negotiations over the jewelry and when petitioner was unable to pay McGirr and Sargis money that he owed them (Pet. App. A-21 to A-23; Tr. 131a-134). It was also stipulated that in previous interviews with the Assistant United States Attorney, both Chappel and Sargis had stated that petitioner was a knowing and willing participant in the scheme and that the threats that

[2] Chappel appeared in response to a subpoena. Sargis was produced pursuant to a writ of habeas corpus *ad testificandum*. Sargis had earlier pleaded guilty to one count of conspiracy; Chappel had not been prosecuted. In view of Sargis' exposure to other charges and Chappel's incriminating statements before the grand jury, the district court found that their invocation of the privilege against compulsory self-incrimination was proper (Tr. 130).

were made to petitioner came only after petitioner fell behind in making payments on the jewelry (Tr. 138-142). The government also offered, in opposition to the defense motion, transcripts of Chappel's grand jury testimony and of statements made by Chappel and Sargis to the FBI (Tr. 135, 145).

The immunity motion was denied by the district court, as were requests to strike McGirr's testimony and to dismiss the case because of the alleged unfairness of the government's refusal to grant immunity to the two witnesses (Tr. 148-153). In a post-trial memorandum opinion, the district court found petitioner guilty and held that he was not entitled to have the government grant immunity to Sargis and Chappel because, *inter alia*, the defense proffer itself showed that their testimony would not have supported a defense of duress (Pet. App. A-6).

The court of appeals agreed with the district court that "[e]ven assuming Sargis and Chappel would have corroborated [petitioner's] testimony, * * * 'it is clear that [petitioner] had many opportunities to escape and thus, the defense of duress is not available.' [Petitioner's] own testimony negates the element of inescapability" (Pet. App. A-6). The court of appeals therefore held that it was unnecessary to determine whether the district court otherwise should have granted petitioner's motions concerning immunity for Sargis and Chappel (*ibid.*). Judge Bright dissented (Pet. App. A-6 to A-14). In his view, the district court should not have concluded that the defense of duress was unavailable without hearing the testimony of Sargis and Chappel. Instead, he concluded, the district court should have conditioned its consideration of McGirr's testimony upon the granting of immunity to Sargis and Chappel (Pet. App. A-14).

ARGUMENT

1. Petitioner contends (Pet. 8-16) that due process requires the government to grant immunity to essential defense witnesses when it is necessary to compel their testimony, at least when the government has immunized its chief witness.[3] The court of appeals, in affirming petitioner's conviction, found it unnecessary to reach this question because it agreed with the district court that, even if Chappel and Sargis would have corroborated petitioner's claim of coercion, their testimony, together with the other evidence, would not have sufficed to support a defense of duress (Pet. App. A-5 to A-6).

The classic and often-cited definition of duress as a defense to criminal liability appears in *Shannon* v. *United States*, 76 F.2d 490, 493 (10th Cir. 1935):

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury.

[3] Petitioner also contends that the government's refusal to immunize essential defense witnesses violates the Compulsory Process Clause (Pet. 11) and the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Pet. 16-19).

Thus, fear alone, even fear for one's life, is not enough to excuse the commission of a crime. *United States* v. *Housand*, 550 F.2d 818, 825 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *United States* v. *Patrick*, 542 F.2d 381, 388 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); see *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). Courts have consistently held that in order to establish the defense of duress, the defendant must show not only that he had a reasonably grounded fear of death or serious bodily injury, but also that the danger was immediate and inescapable. *United States* v. *Housand*, *supra*, 550 F.2d at 824-825; *United States* v. *Patrick*, *supra*, 542 F.2d at 386-387; *United States* v. *McClain*, 531 F.2d 431, 438 (9th Cir.), cert. denied, 429 U.S. 835 (1976); *United States* v. *Gordon*, 526 F.2d 406, 407 (9th Cir. 1975); see also *United States* v. *Hearst*, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *United States* v. *Smith*, 532 F.2d 158, 161 (10th Cir. 1976). Failure to adduce evidence to support each of these elements may properly result in rejection of proffered testimony (*United States* v. *Gordon*, *supra*, 526 F.2d at 407-408) or in refusal to instruct on duress in a jury case (*United States* v. *Patrick*, *supra*, 542 F.2d at 386, 388).

In the instant case, neither petitioner's testimony nor the proffered testimony of Sargis and Chappel indicated either that the threat of injury was immediate or that the danger was inescapable. Rather, as the court of appeals noted, petitioner's own testimony negated the element of inescapability (Pet.

App. A-5 to A-6). He testified that after receiving the threat he flew alone to Miami. Upon his return, he told his wife about the threats. She became very angry with him and told him to go to the police (Tr. 162-163, 165-166). Yet from March until September 1976, petitioner made no attempt to go to the authorities, even though by his own account his contacts with McGirr and Sargis became "off and on" (Tr. 165, 169). Accordingly, it was clear from petitioner's testimony that he had failed to take "the reasonable steps available in an attempt to extricate himself from the apparent danger." *United States* v. *Patrick*, *supra*, 542 F.2d at 388.

Contrary to the view of the dissenting judge (Pet. App. A-7), the district court did not err in concluding that the defense of duress was unavailable without hearing the testimony of Chappel and Sargis. The proffer of their testimony by defense counsel indicated that, at best, they would do no more than corroborate petitioner's account of the threats. Because petitioner's testimony did not establish essential elements of the defense of duress, it was unnecessary for the court to force the government to immunize Sargis and Chappel so that it could hear their testimony, which, even according to petitioner's proffer, would not have supported a defense of duress.

2. Moreover, the power of the Executive Branch to grant immunity to a witness is discretionary; there is no obligation on the part of the United States Attorney to seek immunity, and the court is powerless

to provide immunity on its own motion. See, *e.g.*, *United States* v. *Lang*, No. 78-1205 (2d Cir. Nov. 30, 1978); *United States* v. *Herman*, No. 78-1252 (3d Cir. Nov. 17, 1978); *United States* v. *Rocco*, No. 78-1356 (3d Cir., Nov. 14, 1978); *United States* v. *Benveniste*, 564 F.2d 335, 339 n.4 (9th Cir. 1977); *United States* v. *Housand*, *supra*, 550 F.2d at 824; *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *Earl* v. *United States*, 361 F.2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921-922 (1967). As the court explained in *United States* v. *Alessio*, *supra*, 528 F.2d at 1082: "To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions."

In only one reported case has a court held that the government might be required to grant immunity to a defense witness as a precondition to proceeding with the trial. Contrary to petitioner's assertion (Pet. 13), that case, *United States* v. *Morrison*, 535 F.2d 223 (3d Cir.), cert. denied, 429 U.S. 824 (1976), is quite different from the case at bar. In *Morrison*, the court found that an otherwise willing defense witness was

driven by prosecutorial misconduct to invoke her Fifth Amendment privilege. Relying on *Webb* v. *Texas*, 409 U.S. 95 (1972), the court reversed the conviction, finding that the defendant's right to present witnesses had been denied by the prosecutor's "bizarre conduct." See 535 F.2d at 226-228. In order to guarantee that the harm done by the prosecutor was not irreparable, the court of appeals held that the government on remand must request use immunity for the witness if she refused to testify and that in the absence of such a request, the district court should enter a judgment of acquittal. See 535 F.2d at 229.

The district court was correct in observing (Tr. 149) that the situation in this case does not resemble that of *Morrison*. There is no suggestion of prosecutorial misconduct in this case. Nor is there any suggestion in cases decided after *Morrison* that the Third Circuit meant to mark a departure in that case from the settled rule that the question whether to grant immunity to potential witnesses is ordinarily left to the prosecutor's discretion. In later cases, the Third Circuit has made it clear that the prosecutorial misconduct in *Morrison* constituted a special circumstance that made relief appropriate in that case, but that similar relief would not be appropriate absent such misconduct. *United States* v. *Herman*, *supra*, slip op. 13-14; *United States* v. *Rocco*, *supra*, slip op. 6 n.10; *United States* v. *Niederberger*, 580 F.2d 63, 67 (3d Cir. 1978).

Petitioner contends (Pet. 13-15) that because the government had immunized one of its own witnesses but refused to immunize Sargis and Chappel so that they could testify for the defense, he was denied due process of law. In support of this contention, petitioner relies primarily on a footnote from an opinion of the Court of Appeals for the District of Columbia Circuit, *Earl* v. *United States*, *supra*. In that footnote, the court of appeals speculated that "[w]e might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [defendant's witness]" (361 F.2d at 534 n.1).[4]

As the court observed in *United States* v. *Alessio*, *supra*, the footnote observation of the court of appeals in *Earl* does not suggest that the government incurs an obligation to immunize defense witnesses whenever it relies on immunized testimony; rather, it means only that "whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment." 528 F.2d at 1082. Thus, whether a

[4] Other cases cited by petitioner in support of this contention make no comment on it; they merely note that since the government was not relying on immunized testimony, the problem was not presented. See *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *United States* v. *Ramsey*, 503 F.2d 524, 532-533 (7th Cir. 1974); cert. denied, 420 U.S. 932 (1975). See also *United States* v. *Lang*, *supra*, slip op. 463; *United States* v. *Jenkins*, 470 F.2d 1061, 1063-1064 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973).

defendant has been denied a fair trial depends on the specific circumstances of a particular case. In *Alessio*, for example, despite the fact that the government had granted immunity for one of its witnesses and refused to seek immunity for defense witnesses, the court found no evidence that the defendant had been denied a fair trial, since the testimony sought by the defense would have been merely cumulative of other testimony. *Ibid.*

The facts of the instant case similarly show that petitioner was not denied a fair trial. As we discussed above, petitioner's own testimony had already negated an essential element of his only defense. Thus, the testimony of Chappel and Sargis, even if it corroborated petitioner's testimony, would not have aided him. Indeed, the district court, which sat as the trier of fact, was told essentially what defense counsel expected Chappel and Sargis to say if they were compelled to testify, and the court observed that, even assuming the credibility of their testimony, it did not appear that it would be greatly supportive of petitioner (Tr. 151-152).[5] In sum, even accepting the

[5] Petitioner's argument that the government's refusal to request immunity for defense witnesses was a violation of its duty under *Brady* v. *Maryland*, *supra*, to provide the defense with exculpatory evidence is also without merit. There was absolutely no suppression of favorable evidence in this case. On the contrary, the prosecutor promptly notified defense counsel as soon as it appeared that Chappel might be changing his story to a version more supportive of petitioner (Tr. 114). Moreover, the government made sure that both Chappel and Sargis were present and available to testify. See note 2, *supra*. The witnesses' refusal to testify did not result from any inter-

suggestion in *Earl* that there may be circumstances in which a refusal to immunize a prospective defense witness would deprive the defendant of a fair trial, this is not such a case, and it therefore affords this Court no opportunity to pass upon the issue in any useful way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ference on the part of the prosecutor. In such circumstances, to require further that the government *compel* the giving of favorable testimony would be an unwarranted extension of the holding in *Brady*. *Earl* v. *United States*, *supra*, 361 F.2d at 534.

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